IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 18

DAVID FRIEDBERG,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, David Friedberg, prays that a writ of certiorari issue to review an order and judgment entered by the Court of Appeals for the Sixth Circuit on October 16, 1953, and the order denying the petition for a rehearing, entered on November 30, 1953. Said order and judgment affirmed a judgment whereby petitioner was convicted and sentenced by the District Court for the Southern District of Ohio, Eastern Division, to serve a sentence of eighteen months and to pay a fine of Ten Thousand ($10,000.00) Dollars and costs for an alleged violation of the provisions of Title 26, Section 145 (b), of the

United States Code—wilfully filing false and fraudulent income tax returns for the years 1945, 1946, and 1947.

OPINIONS BELOW

The District Court wrote no opinion. The Court of Appeals did not file a written opinion, but entered a two-page order which summarily passed on the serious issues presented by this case. This order of the Court of Appeals is set forth in the record, and has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1953, and the petition for rehearing was denied on November 30, 1953, at which time the execution of the mandate was stayed pending filing of this petition. The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254, of the United States Code.

QUESTIONS PRESENTED

The questions presented in this petition are:

1. Did the Government establish the taxpayer's basic net worth at the start of the taxable years in question sufficiently to present an issue for jury determination?

2. Should the District Court have permitted revenue agent Clager to have given his conclusions why no cash was allocated, prior to 1945, to petitioner's net worth?

3. Was the Court's supplemental instruction to the jury to compromise and adjust their differences prejudicial error?

STATUTE INVOLVED

The petitioner was convicted for alleged violations of the provisions of Title 26, Section 145 (b), (Internal Revenue Code), which reads as follows:

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
(26 U. S. C. 1946 Ed., Sec. 145 [b].)"

Rules 30 and 52 (b) of the Federal Rules of Criminal Procedure, which read as follows, are likewise involved:

"Rule 30.

. . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

"Rule 52.

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT OF CASE

This is one of the very first cases in which the Government proceeded strictly on an increased net worth basis, without any effort made to show additional income in any one year or excessive expenditures at any time. The theory of the prosecution was based solely upon the assumption that the petitioner, David Friedberg, had no cash or currency in his possession at the end of 1941, 1942, 1943, or 1944. Throughout the briefs, and in oral argument, counsel

for both sides have agreed that the appeal rises or falls on the issue of the existence or the non-existence of cash on hand prior to December 31, 1945. The keystone of the Government's case was its Exhibit 2, a net worth statement for the years 1941 through 1947, prepared by revenue agent Francis J. Clager some time in 1948. The starting point was December 31, 1941, and the net worth statement does not credit the petitioner with any cash on hand until December 31, 1945. It is interesting to note that, with the exception of the cash and bonds which were voluntarily disclosed by the petitioner in 1947, at the beginning of the investigation, and with the exception of the failure to credit the petitioner with cash on hand prior to December 31, 1945, all the items on Exhibit 2 were agreed to by stipulation (R. 172, 343).

The background of the case is summed up by District Judge Underwood in passing sentence:

> "You have a fine family, as your counsel said. You are not a racketeer, you are not one of the big fish in escaping tax, but a jury said, Mr. Friedberg, that you are guilty" (R. 1171).

David Friedberg was not a gambler, or racketeer, such as those against whom the net worth method is ordinarily employed. David Friedberg owned and operated a tailoring business known as The Buckeye Tailoring Company at 180 South Third Street in Columbus, Ohio. The firm operated under the name of American Mill Tailors, and sold at wholesale as the Jackson Tailoring Company, but there was only one bank account, through which all checks cleared (R. 729, 730). Petitioner and two others had owned and operated American Mill Tailors since about 1920, first in Dayton, Ohio, and then, from 1923, in Columbus (R. 559). In 1941 this corporation was dissolved, and

from that date David Friedberg operated it himself (R. 728).

Friedberg was indicted for understating his income not only for the years 1945, 1946, and 1947, but was also indicted for the year 1944, and, strangely, in a net worth increase case, the jury acquitted for 1944, but found him guilty for the three following years.

The entire appeal centers around a sum of cash and bonds which the petitioner voluntarily disclosed to agent Curtis and deputy collector Nerny.

An investigation of the petitioner's finances was begun in the fall of 1947, Friedberg first being questioned by a revenue agent on about September 20, 1947. On October 10, agent Curtis asked if Friedberg owned any bonds. Friedberg said that he did, and that they were in a safety deposit box belonging to his wife, which was in her maiden name. The two men were joined by a deputy collector, and the three immediately proceeded to the bank and examined the box. Therein was found $19,600.00 in cash, and $53,625.00 (face value) of United States Bonds.

After a thorough investigation, lasting some time, an indictment was filed on December 15, 1950. Despite the fact that Friedberg and his wife insisted that the bonds and currency were the savings of his wife, who had managed their funds since their marriage in 1915, the agents arbitrarily allocated the $70,087.50 as income in the years 1944, 1945, 1946 and 1947. Although Friedberg reported a gross income for the years 1945, 1946, and 1947, of $37,471.65, $58,782.36 and $64,623.91 respectively (Ex. 1C, 1D, 1E), the prosecution contended in the indictment that he understated his net income for those years by $19,656.82, $18,091.41, and $35,053.86 respectively. The returns indicate a rather high gross for an operation of the modest scale which petitioner conducted, but the agents claimed that he netted $35,053.86 additional in 1947. The jury

acquitted on Count I (1944), where the understatement of net income was claimed to be $13,628.32.

In the safety deposit box were found various envelopes. One contained $2,000.00 cash, and was marked "1945." One contained $5,000.00, and was marked "1946." The balance of $12,600.00 in cash was found in unmarked envelopes. Thereupon, the agents allocated $2,000.00 as income in 1945, $5,000.00 as income in 1946, and $12,600.00 as income in 1947. The bonds were allocated as income in the years purchased.

Thus, the case was resolved into one issue. Had the Friedberg's accumulated $70,000.00 in cash (or other items) by 1944, as they testified that they had, or was the sum found in the deposit box all earned in 1945, 1946, and 1947, as the prosecution alleged? The legal issue which resulted is whether the prosecution proved the net worth starting point sufficiently to permit the District Court to present the factual issue to the jury for determination.

The prosecution did not attempt to show any unreported income in the years covered in the indictment. The trial, and the appeal, centered around the "Cash" item on the net worth statement (Ex. 2). While the prosecution offered a hodge-podge of vague, remote, circumstantial evidence, susceptible of various inferences and conclusions, as will be treated later, the only direct testimony concerning the net worth schedule treatment of cash on hand was that testimony of agent Clager which appears at pages 371 et seq. and 443 to 445 of the record.

At page 369, defense counsel asked Clager, on cross-examination:

> "You gave no credit to the defendant for any cash in the year of 1941, did you, Mr. Clager?"

After three pages of sparring on this simple question, over the objection of defense counsel, the Court instructed

the witness to answer and to explain his answer. The witness said:

> "I did not include currency at the end of the year 1941 because *my investigation disclosed no evidence* which would permit me to put such a figure of currency in my schedule" (R. 371). (Emphasis ours.)

Later, on re-direct examination, the witness Clayer was asked why he did not, in the schedule, credit Friedberg with any cash until 1945. He had previously admitted (R. 369) that, if the Friedberg's did have cash, the net worth statement would be inaccurate, and (R. 373, 376) that he did not know of his own personal knowledge whether Friedberg had any cash on hand at the beginning point, or even during any given year. Despite his lack of personal knowledge, he proceeded to give his conclusions, based on hearsay statements of others, and on assumptions. He related various financial incidents, which will be discussed in detail later, drew the most damaging of several possible inferences from the incidents, and then blithely skipped for six years, from October 30, 1939, the date of the last of these incidents, to December 31, 1945 (when cash was first credited), by saying:

> "I also examined the taxpayer's source of capital as shown by his records for the years 1941 and 1942 and found no indication of currency from an undisclosed source. In other words, all funds flowed from known assets of the taxpayer's bank accounts. I also found that in analyzing the bank account just prior to the period under review, that all deposits were from known sources.
>
> "And so, for those reasons, I could see no reason why I should give consideration, or rather, include in this statement which I have prepared an amount of currency, which he states he would have" (R. 445).

The defense immediately but vainly moved that this conclusion be stricken, having previously pointed out that the witness was usurping the function of the jury in giving a pure opinion on the ultimate issue of fact.

Finally, after the jury had been deliberating for four and one half hours on Thursday and Friday, January 10 and 11, 1952, the District Court called in the jury to go to lunch. Without any request from either side, the Court said (R. 1146) in part:

> "The Court will stand in recess until one-thirty. The Court may say to the jury at this time that I want you to make an honest and sincere effort to reach an agreement as to the merits of this case. I do not want you to shirk your duty. I want you to be fair to the Government, the United States, and the defendant. Nevertheless, this case has taken many days to try, and *I hope you will make a sincere effort to compromise and adjust your differences and reach a verdict, if possible.*" (Emphasis ours.)

The jury apparently took the suggestion from the Court and within an hour and forty-five minutes returned with this purely compromise verdict.

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In holding that the prosecution sustained its burden of proof in establishing the petitioner's net worth at the start of the tax years in question sufficiently to present an issue for jury determination.

2. In holding that there was no reversible error in the admission of the opinion testimony of agent Clager.

3. In holding that the District Court's supplemental instruction to the jury to compromise and adjust their differences was not prejudicial error.

REASONS FOR GRANTING THE WRIT

1. Identity of Question Presented with a Pending Case.

On November 16, 1953, this Court granted review of *Remmer* v. *United States*, No. 304, on certiorari to the Court of Appeals from the Ninth Circuit, reported as 205 Fed. (2d) 277. One of the prime questions in the *Remmer* case is identical with the prime question in this case, and a writ of certiorari should issue in this case pending the final decision in the *Remmer* case. The identical point is the basic question of whether the Government may force the burden of proof on a defendant in a tax case, merely by the device of using the net worth method, and forcing the defendant, at his peril, to assume the burden of proving that he had cash on hand.

2. The Prosecution Failed to Sustain Its Burden of Proof as to the Starting Point Net Worth, and Forced the Petitioner to Assume the Burden of Proof as to Cash.

The petitioner submits, most strongly, that the time has come for this Court to end the conflict between the Courts of Appeal on the proper manner of establishing a starting point in a net worth case. While the Circuit Courts, generally, acknowledge that a net worth method proves nothing unless a starting point is established, there is a deep and serious split between the Circuits as to the manner of establishing the starting point. See opinion of Hutcheson, Chief Justice, Court of Appeals for the Fifth Circuit, in *Demetree* v. *United States*, No. 14488, decided November 24, 1953, not yet reported.

In *Venuto* v. *United States*, 182 Fed. (2d) 519, the Third Circuit held that the prosecution must still prove its case by traditional rules even though proceeding under the net worth method. In *Bryan* v. *United States*, 175 Fed. (2d) 223, the Fifth Circuit, in ruling on a net worth case, said at page 227:

> "The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant."

In *United States* v. *Fenwick*, 177 Fed. (2d) 488, the Seventh Circuit used almost the same language as the *Bryan* case (p. 490), and said:

> "Evidence of mere probability of guilt, of course, is not sufficient."

The Courts of Appeal of some of the Circuits have discarded this traditional approach to a criminal case. For so doing, they were roundly criticized by the Court for the Third Circuit in *United States* v. *Caserta*, 199 Fed. (2d) 905, at page 907:

> "The cases show, however, a rather *surprising rule* that when the discrepancy between increased net worth and reported income is shown, the *burden of explanation shifts to the taxpayer*, at the same time repeating the usual criminal law rule that the burden throughout a criminal case is *upon the prosecution*." (Emphasis ours.)

The Courts of Appeal which follow the rule just criticized, such as, for example, the Ninth (*Renner* v. *United States*, 205 Fed (2d) 277, now pending in this Court as No. 304), the Eighth (*Schuermann* v. *United States*, 174 Fed. (2d) 397), and obviously the Sixth, in the instant case, are more concerned with the problem of the Government in tax-collecting, and would lighten its load by permitting it to shift the burden of proof where a net worth method is used. Why this particular method of accounting should enjoy special privileges is not clear.

A resumé of the evidence which the Court of Appeals in the instant case found sufficient to sustain the prosecution's burden of proof, will illustrate the price which the individual pays in order to facilitate tax collection.

This is not a case where the taxpayer's own statement, or a clear insolvency, furnishes the starting point. To the contrary, the prosecution rejected the starting valuation which the petitioner and his wife both testified to at length during the trial.

The trial opened with the prosecution calling witness after witness, and introducing document after document, to show that the petitioner concealed income through the use of a bookkeeping arrangement which was styled "Friedberg loan." Finally, on cross-examination, Special Agent Clager had to admit not only that all this money had been returned as income (R. 309, 396), but also that, including these items, more funds were reported as income than were shown on the books (R. 399-400).

Since the "Friedberg loan" turned out to be merely sloppy bookkeeping, the prosecution was left with a set of circumstantial evidence too remote to prove anything, and with the opinion testimony of agent Clager, which was so improper that it should have been stricken when it was objected to.

a. Foreclosure on the Bedford Avenue (in 1934) and on the Sheldon Avenue (in 1935) real estate. Actually, agent Clager admitted that the Bedford Avenue (R. 438) property had been sold by Friedberg in 1928, and that the Sheldon Avenue (R. 434) property had been sold by Friedberg in 1929. In both cases the grantee merely assumed the existing mortgage, which, of course, did not extinguish Friedberg's liability on the mortgage. However, several years later, at the foreclosures, Friedberg felt that he had no interest in the property or the proceedings (R. 837, 843).

b. Foreclosure on the Nelson Road property. Friedberg testified (R. 909 et seq.) that he and his wife were dissatisfied with the property, and got permission to rent it. As soon as they did so, foreclosure was instituted, provoking

them, in 1934. None of the foreclosure testimony shows that it would have been to Friedberg's financial advantage to satisfy the judgments.

c. Printing Company unsatisfied judgment. In 1936 a writ of execution was returned "Nothing found upon which to levy" (R. 1241). However, the return of levy is hearsay, and the testimony does not show if the deputy sheriff actually made a search, or just filed an office return. Also, it need scarcely be pointed out that the non-payment of judgments makes it easier to accumulate savings.

d. Entries into safety deposit box. An analysis was offered to show that petitioner entered his box more frequently in the latter years than he did in the earlier years. If, as the prosecution must, and does, claim, Friedberg had no cash in this box from early 1941 until the end of 1945, then one must assume that Friedberg kept blank papers in the box during that period, and visited the box to examine the blank papers.

e. Loan application (R. 1247). This was offered because therein, in 1939, petitioner listed $150.00 for his cash, and a cashier's check for $2,000.00. Petitioner testified that he was merely listing enough to obtain the loan (R. 891-892). Incidentally, the application also fails to list the securities which Government Exhibit 2 N shows petitioner owned at the same time.

This type of evidence is too remote and too speculative to meet the test set forth in *Curley* v. *United States*, 160 Fed. (2d) 229, 232 (C. A. D. C.):

> "The true rule, therefore, is that a trial judge in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable person might fairly conclude guilty beyond a reasonable doubt."

This evidence is buttressed in no wise by the only evidence on the years 1939 to 1945, namely, a mere opinion by agent Clager that his investigation did not permit him to credit cash during those years (R. 371).

The instant case is the perfect example of the line of cases criticized by the Fifth Circuit in a case decided as recently as November 24, 1953, No. 14488 on its dockets, and not yet reported (*Demetree* v. *United States*) (page 3 of Folio):

> "This kind of latitudinous allowance of *the admission and use of conclusions* as evidence and the submission of the case to the jury without a scrupulous adherence to the theory, has resulted in a tendency to accept, if not in the complete acceptance of, the idea that in a case tried by this method, ordinary *rules of proof may be relaxed if not disregarded.* Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a *prima facie* case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, *estimates, conjectures,* and *conclusions* which the government has been allowed to get into the record, upon the apparent theory that it is *up to the defendant to explain all of it away as part of his burden to prove his innocence.*" (Emphasis ours.)

The opinion of this Court in *United States* v. *Johnson*, 319 U. S. 503, has been distorted far beyond the intention of this Court. It is time for this Court to restate the law.

3. The Opinion Testimony of Agent Clager Was Grossly Improper, and Should Have Been Excluded.

The Courts of Appeal have also been relaxing the rules as to the use of, and the admissibility of, testimony of accountants as expert witnesses. The Court of Appeals for the Sixth Circuit recently said [*Stevens* v. *United States*, 206 Fed. (2d) 64]:

> "an arbitrary or unreasonable interpretation by the Government agents would have properly been rejected by the court, but an interpretation by an experienced accountant which is considered a reasonable and proper one by the court, was properly received in evidence as tending to show what the books reflected with respect to the different expense items involved."

The difficulty lies in the words "reasonable and proper." An analysis of the instant case illustrates graphically the limits to which the lower courts are going.

To begin with, Special Agent Clager was not an experienced accountant, but was graduated from college in 1940, and became connected with the Bureau of Internal Revenue in 1946, a year before this investigation began. He was not a Certified Public Accountant (R. 367, 366, 367). He did not know, personally, if Friedberg ever had any cash (R. 373, 376).

However, the only direct evidence on the issue of cash on hand was the pure opinion of Special Agent Clager. When asked on cross-examination simply if he credited Friedberg with cash in 1941, Clager volunteered:

> "I did not include currency at the end of the year 1947, because *my investigation* disclosed no *evidence* which would permit me to put such a figure of currency in my schedule" (R. 371). (Emphasis ours.)

This answer was given with the permission of the Court, over the objection of the defense.

The Court persisted in its opinion that such testimony was competent, and a short time later, on re-direct examination, over the objection of the defense, Clager was permitted to answer:

> "Based on the following evidence I did not include currency in my financial statement. . . ."
>
> (Narrating the circumstantial events which transpired in the 1930's.)
>
> "And so, for those reasons, I could see no reason why I should give consideration, or rather, include in this statement which I have prepared an amount of currency which he states he would have" (R. 443-445).

Such testimony is a far cry from the customary hypothetical question. It was an argument, the same as the District Attorney could later make to the jury. And, worst of all, it permitted a witness to argue, in his testimony, on the ultimate question to be determined by the jury. As was said in *United States* v. *Ware*, 110 Fed. (2d) 739, 742 (C. A. 5):

> "The courts have held repeatedly that it is not permissible for an expert to give his opinion upon the ultimate question to be determined by the jury."

The admission of Clager's opinion was clearly in violation of a long-established rule in this Court, which was well expressed in *United States* v. *Spaulding*, 293 U. S. 498, 506:

> "Moreover that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phase and other questions of law. The experts ought not to have been asked or allowed to state their *conclusions on the whole case*." (Emphasis ours.)

4. The District Court's Supplemental Instruction to the Jury to Compromise and Adjust Their Differences Was Reversible Error.

The supplemental instruction to the jury raises a comparatively new, but a very deep problem in the interpretation of the Federal Rules of Criminal Procedure.

After the jury had deliberated on Thursday and Friday, January 10 and 11, 1952, the Court called the jury in for the noon recess. Without request from either side, the Court said (R. 1146):

> "The Court will stand in recess until one-thirty. The Court may say to the jury at this time that I want you to make an honest and sincere effort to reach an agreement as to the merits of this case. I do not want you to shirk your duty. I want you to be fair to the Government, the United States, and the defendant. Nevertheless, this case has taken many days to try, and *I hope you will make a sincere effort to compromise and adjust your differences and reach a verdict, if possible.*" (Emphasis ours.)

The jury apparently took the suggestion from the court, and within an hour and forty-five minutes returned with a compromise verdict of not guilty for 1944, and guilty for 1945, 1946 and 1947.

The issue presented is the effect of Rule 30 of the Federal Rules of Criminal Procedure, when Rule 52 (b) also is applicable. Specifically, where a supplemental, rather than a regular, instruction is given to the jury, need an exception be taken, or does Rule 52 (b) serve in the place of a formal exception? To state the question practically, should petitioner be denied a new trial because his trial counsel failed to object to this off-the-cuff charge, and because trial counsel, in arguing a motion for new trial, first claimed this obvious error, and then waived it (R. 1162, 1163).

The District Judge apparently recognized the error, for, during argument on the motion for acquittal or a new trial, he inquired of defense counsel at least five times (R. 1161, 1162, 1163) whether error was claimed.

The established rule was well stated in *United States* v. *Raub*, 177 Fed. (2d) 312, 315 (C. A. 7), relying on *Screw* v. *United States*, 325 U. S. 91, 107:

> "It appears to be generally established now that—Rule 30 notwithstanding—in a criminal case involving life or liberty of a defendant, an appellate court may notice plain and serious prejudicial error in instructions even though it was not called to the attention of the trial court."

The rule was also stated as recently as November 24, 1953, in an unreported case in the Fifth Circuit (No. 14488), *Demetree* v. *United States*, where error was found in the same sort of offhand supplemental instruction as is found here, and also where no exception was taken:

> "The error dealt with in the fourth group, however, the court's colloquies with, and instructions to, the jury in connection with the question of punishment, constituted reversible error.
>
> "Our conclusion that the judgment should be reversed because of the error of the judge in inducing the verdict, notwithstanding the jury's stated inability to agree, by stating to them that the defendant could be put upon probation or fined, and his ready assurance, in answer to the jury's question as to his own attitude, in effect that he would be lenient, makes it unnecessary for us to consider in detail the grounds of error assigned in groups five and six" (page 6 of folio).

To the same effect is *United States* v. *Stoehr*, 100 Fed. Supp. 143, 152, which relies on *Bollenback* v. *United States*,

326 U. S. 607, and also *Battle* v. *United States*, 206 Fed. (2d) 441 (C. A. D. C.).

The Court of Appeals for the Sixth Circuit, in the instant case, is in conflict with the Seventh Circuit (*United States* v. *Raub*, supra), and the Fifth Circuit (*Demetree* v. *United States*, supra), and is mis-interpreting prior opinions of this Court on a vital issue of federal criminal law. This is clearly a case such as Justice Peckham described in *Burton* v. *United States*, 196 U. S. 283, 307:

> "Balanced as the cause was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted, and the decision of the Court of Appeals for the Sixth Circuit, reversed. Certainly the case presents even more serious questions than are to be reviewed by this Court in *Remmer* v. *United States*, 205 Fed. (2d) 277 (C. A. 9), where certiorari has been granted.

Respectfully submitted,

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